APPEAL NO. 93470

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 19, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue under consideration at the hearing was whether claimant suffered a compensable stroke on (date of injury). The hearing officer determined that the appellant, claimant herein, did not suffer a compensable stroke on (date of injury). Claimant contends that the hearing officer decision is contrary to the great weight and preponderance of the evidence, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Finding sufficient evidence to support the decision, we affirm.

It is undisputed that claimant was a 48 year old male maintenance employed by , employer. Claimant's duties required him to repair broken equipment. On (date of injury) (all dates are 1992 unless otherwise noted) claimant testified he was working in a large metal building "in the old scrap bay." Claimant testified that his work was physically very hard and that the work area was very hot, as it was in the proximity of two furnaces and a hot slag pile. Claimant stated that on June 10th the outside temperature was around 100°, and that there was no breeze inside the building in that it was totally enclosed. The testimony of claimant, and others, was that other employees have had heat related problems and that claimant had in the past suffered from heat exhaustion. Claimant testified he did not know he had experienced a stroke until doctor's at the hospital diagnosed it. Claimant stated he remembers perspiring heavily, believes he went to change clothes and had not eaten his lunch. He was later found walking across the yard, after having walked into a pickup. Claimant was taken to the employer's nursing station where he rested and drank cool liquids for a period of time until the ambulance arrived.

Claimant is overweight and smokes cigarettes. Claimant testified he had been ill with some sort of stomach virus for about two days before June 10th. He stated he was not aware that he might have had several small strokes in the days preceding June 10th. Two other witnesses testified, but that testimony generally dealt with how hot it was in the work area and the general nature of claimant's work.

The hospital admission record of June 10th, shows as the chief complaint "stroke," a history that claimant "felt flushed and hot," while in the ER "[h]e had an abrupt onset of left hemiparesis and . . . his wife tells me he has had episodes of left arm tingling and numbness over the past several days." Claimant was noted as having ". . . uncontrolled hypertension and smokes a package and a half of cigarettes daily . . . and is really not very fastidious to his diet or health." The report concluded claimant had "1. Cerebral infarction, probable. 2. Hypertension." The report is signed by (Dr. F) who noted "more than likely, this is a simple defect of uncontrolled hypertension, cigarette abuse and lipid excess." On July 6th, in

response to a call from claimant's wife, Dr. F noted that he told claimant's wife that he was unsure of whether the "heat [medical symbol notation] exhaustion contributed to [claimant's] CVA . . . but would think it's possible." After what appears to be another telephone inquiry, Dr. F, by letter dated August 27th, stated "[i]t is my opinion that both pre-existing risk factors and work conditions, including excessively high temperatures and dehydration, have contributed to his stroke." Claimant was also seen and evaluated by D T. clinical neuropsychologist, (Dr. T). Dr. T does not give an opinion about the cause of claimant's stroke but in an extensive history states:

> [Dr. F] diagnosed [claimant] as having suffered a right CVA with left hemiparesis. Incidentally, the patient's family reports that he had been experiencing apparent TIA's for a couple of weeks prior to his recent acute illness. He apparently had been having transient episodes of numbness
> and tingling in the left arm as well as difficulty seeing in the left visual field. During the last couple of weeks, [claimant's] medical condition has stabilized.

The hearing officer found that claimant suffered a stroke while at work, but that the stroke was not caused by claimant's work or his working conditions. As noted, claimant appealed, basically on a sufficiency of the evidence basis.

Before discussing the sufficiency aspects we are compelled to comment on an erroneous evidentiary ruling by the hearing officer, if for no other reason, to avoid the proliferation of what we perceive to be an incorrect interpretation of the law. Claimant, in his appeal, several times argues that "[t]he carrier brought forth no medical evidence to controvert or dispute [Dr. F's] opinion." In its response carrier notes ". . . there was medical from Dr. Edmondson . . . [but his] report was not admitted into evidence, although timely exchanged . . . ." The record indicates that at some point carrier apparently sent the available medical records to Dr. Everton Edmondson (Dr. E), a medical doctor specializing in neurology, neuro-oncology and pain management for "an independent review of [claimant's] clinical course and to discern if this is a work related problem." Dr. E's report of February 20, 1993, was exchanged with claimant and presented at the benefit review conference. At the CCH, Dr. E's report was offered into evidence but claimant's attorney objected on the basis that it was "not proved up by affidavit." Carrier replied, its position was ". . . that you do not have to prove up medical records by affidavit at these proceedings. The report is from [Dr. E], and he has signed the report." The hearing officer asked if carrier contends Dr. E is a health care provider and carrier stated "[y]es, ma'am." The hearing officer then asked if Dr. E "actually examined [claimant] or provided treatment . . . ." Carrier replied that claimant was not examined by Dr. E but that the records had been exchanged. The hearing officer responded:

> Based on the Appeals Panels decisions to the effect that independent medical examination -- designate a doctor, appointment, et cetera -- do not constitute health care, I'm inclined to decide [Dr. E] is not a health care provider;

> therefore, his reports are not included within the section of the Workers' Compensation Act that says signed statements by a health care provider are admissible. I'm going to sustain the objection.

Carrier was refused a continuance to obtain an affidavit from Dr. E.

Article 8308-6.34(e) states "[t]he hearing officer may accept written statements signed by a witness and shall accept all written reports signed by a health care provider." (Emphasis added.) A health care provider is defined in Article 8308-1.03(22) and (23) as a licensed individual who provides or renders health care. It would appear to us that Dr. E is a licensed medical doctor (i.e. health care provider), whose signed report had been properly exchanged, which report shall under provisions of the above cited section 6.34(e), be admitted. The hearing officer based her erroneous ruling on "Appeals Panels decisions . . . ." In that no specific decision is identified we can only speculate what the hearing officer intended. In Texas Workers' Compensation Commission Appeal No. 92222, decided July 15, 1992, citing Texas Workers' Compensation Commission Appeal No. 92203, decided July 6, 1992, we held that medical examinations do not constitute health care. However, that does not mean that a physician performing an evaluation, based on medical records, is not a health care provider. In a series of cases including Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993; Texas Workers' Compensation Commission Appeal No. 93140, decided April 12, 1993, and Texas Workers' Compensation Commission Appeal No. 93337, decided June 10, 1993, we held that a designated doctor must personally examine the injured employee and not just review records and totally rely on examinations of others. Appeal No. 93095, also cited Texas Workers' Compensation Commission Advisory 93-04, dated March 9, 1993, which states that evaluations for certification of MMI and rating of impairment "must include a physical examination and evaluation by the doctor." However, those cases all involved examinations by a designated doctor for purposes of MMI certification and impairment rating as opposed to the instant case where the carrier sought an expert medical opinion as to causation. The hearing officer erred in excluding Dr. E's report. Dr. E's report should have been admitted as a written report signed by a health care provider. In this case the error is not reversible error in that Dr. E's report supports the hearing officer's decision.

The hearing officer, as is evident in her discussion, believed ". . . in cases where the matter of causation is not within an area of common knowledge or experience, including cases of stroke, expert evidence is needed . . . ." Obviously the hearing officer is referring to the holding in Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.) which held that generally the trier of fact may accept lay testimony over that of medical experts. However:

> an exception to these well settled general rules is that, when a subject is one of such scientific or technical nature that (the trier of fact) cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of the inquiry, only the testimony of experts skilled in that subject has any probative value. [Citations omitted.] It has been held that the cause, progression, and aggravation of disease, and particularly cancer, are such subjects.

The hearing officer concluded that a stroke was also such a subject. In this case, the hearing officer clearly believes that expert medical opinion must establish that an injury, stroke in this case, is linked to the work place as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. Schaefer v. Texas Employers' Insurance Association, 612, S.W.2d 199 (Tex. 1990). The hearing officer clearly weighed Dr. F's first report in the hospital record on June 10th, and his note of July 6th against his statement of August 27th, where Dr. F stated that claimant' "work conditions, including excessively high temperatures and dehydration [mentioned here for the first time], have contributed to his stroke." The hearing officer found that the medical records and diagnoses made at the time of the stroke outweigh Dr. F's subsequent letter saying both preexisting and work conditions contributed to the stroke. Contrary to claimant's statement that the hearing officer "completely disregard [Dr. F's] unequivocally stated opinion" it is amply clear in her discussion that she considered the medical records as a whole.

Our affirmance of the hearing officer's decision in this case does not necessarily endorse the proposition that, in cases of stroke, the level of expert medical evidence required by the hearing officer in this case is, as a matter of law, required in all stroke cases. In Texas Workers' Compensation Commission Appeal No. 91064, decided December 12, 1991, we distinguished the causal standards required in heart attacks under Article 8308-4.15 from strokes. In that case, we held that there was error in admitting a certain doctor's report, but nevertheless based on the claimant's testimony, in that case, of lifting a bus tub of dishes, being driven home, sudden onset of weakness, and an admitting doctor's opinion of a possible mild stroke, we affirmed the hearing officer's determination, in that case, that the job related incident of lifting the bus tub was a producing cause of respondent's stroke. In the instant case, the hearing officer, as the trier of fact, believed she needed expert medical testimony to establish causation. We do not hold that to be in error, but only point out that as a matter of law, all stroke cases do not necessarily require causation to be proven by expert medical testimony as required in Pegues, *supra*, and Schaefer, *supra*.

Claimant, in his appeal, stresses the testimony of claimant and another witness on how "extremely hot" and physically demanding claimant's work was. Although carrier disputes the temperature was 150°, it is undisputed that the work was hard and the temperature very hot, by any standard. However, this testimony by claimant and his coworker does not constitute expert medical testimony required by the hearing officer to prove hard work and a hot work place can cause or contribute to stroke or a cerebrovascular accident. The only expert medical testimony or evidence on that point is the one sentence in Dr. F's August 27th letter.

Claimant in a workers' compensation case, has the burden of proof to establish that a compensable injury arose in the course and scope of employment Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. App. - Beaumont 1976, writ ref'd n.r.e.). In this case, the hearing officer believed that claimant must provide expert medical evidence of the causation between his physically demanding duties and hot work place and his injury, the

stoke. The hearing officer reviewed all the evidence (except that of Dr. E) and determined that claimant had not met his burden of proving a compensable accident. Upon review of the record, we find that the hearing officer decision is not against the great weight and preponderance of the evidence.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). When the appeal is based on sufficiency of the evidence we will not substitute our judgement for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Assn. v. Alcantra, 764 S.W.2d 865 (Tex. App. - Texarkana 1989, no writ). In this case, the evidence supporting the decision of the hearing officer is even further supported by Dr. E's report, which was erroneously excluded. The challenged decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986),

Finding sufficient evident to support the decision, we affirm.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Joe Sebesta
Appeals Judge